

## BRIEF SUPPORTING THE FOREGOING PETITION.

### POINT I.

It was error to hold the riders and their attachment valid; and if such riders were not validly attached, the policies were not taxable.

Both of the lower courts found as fact that the writing agent, Mr. Mabie, intended to have the policies issued and become effective and to thereafter amend them by means of the riders. The District Court found in particular that the insured having received the policies in their original form had "the option of accepting or rejecting them in their entirety, he accepted them" (fols. 393-4). That the Court regarded the policies as having become legally operative and binding upon such "acceptance" by the insured cannot admit of doubt, for the Court found further, as fact, that "the decedent-insured *as owner (under paragraph 34)* exercised his right to elect a 'Settlement Option'" (fol. 396). In its decision underlying these findings of fact, the Court had said:

"When the policies were issued and delivered, the insured had the option of accepting or rejecting same in their entirety. He apparently accepted them retaining them *in their original form* for over two months and then succeeded in engrafting upon them the agreements accepted by the insurance company on September 8, 1924" (fols. 303-4).

These findings were in no way disturbed by the Circuit Court and they are in no way inconsistent with the view that if an error was made by the insurance agent it

was an error of law in supposing that the policies could be amended by the insured "as owner" despite the failure to reserve his right to change the beneficiary. The right to select a settlement option was given to "the owner", without definition of that term.

Not only did the District Court recognize the effectiveness of the policies as originally issued, but it also recognized the impropriety of any attempt on the part of the court to reform the policies in this litigation, for in one part of its opinion it said:

"The recognition of plaintiff's claim would amount to a reformation of the insurance contracts *without the necessary parties being before the court or the revision of the contracts by judicial construction.*" (Italics ours.) (fol. 302.)

That Court found its way out of the dilemma by holding that the insurance company had recognized the insured as "owner"; that he had acquiesced in such recognition, estopping his estate from negating it, and that the beneficiaries were also estopped because they had accepted the benefits under the policies and riders (fols. 260; 303). The beneficiaries were infants when the insured died, and had no knowledge of the facts relating to the riders (fol. 260; p. 151). How could they ratify or be estopped by taking money without knowledge of the facts?

The District Court's finding that the policies became effective, as originally written, is supportable.

*Interstate Chemical Corporation v. Duke*, 176 App. Div. (N. Y.) 684 at 693, 4 and cases cited.

Any conclusion therefrom that they could thereafter be amended was clearly erroneous.

*Avery v. Equitable*, 117 N. Y. 451.

*Dampskibs Aktieselskabet Thor v. Tropical Fruit Co.*, 281 Fed. 740 at 743;  
*In re: Gordon*, 313 Pa. 118, 169 A. 85;  
*Baird v. Publishers', etc.*, 199 N. W. 757;  
*Pennsylvania Co. etc. v. Commissioner of Internal Revenue*, 79 Fed. 2nd 295;  
*Ruckenstein v. Metropolitan Life Ins. Company*, 263 N. Y. 204;  
*Ryan v. Rothweiler*, 50 Ohio St. 595;  
*Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156;  
*Caplin v. Penn Mutual Life Ins. Co.*, 100 Misc. 374;  
*Davis v. Modern Industrial Bank*, 279 N. Y. 405;  
*Morgan v. Penn Mutual Life Ins. Company*, 94 Fed. 2nd 129.

Estoppel against the infant beneficiaries, or implying their consent to the affixation and the terms of the riders, could not properly be invoked to toll the law.

15 C. J. S. 980;  
*Matter of McNeil*, 165 App. Div. (N. Y.) 842;  
 31 C. J. 1004-1009.

In view of the District Court's findings of fact and the conclusions of law properly and necessarily to be drawn therefrom, the Circuit Court should have reversed the judgment of the District Court, for the acceptance of the policies and retention of them either foreclosed the insured if an error of fact was involved in writing the policies without right to change beneficiary and no reformation could have been obtained.

*Interstate Chemical Corp. v. Duke (supra)*,  
*Avery v. Equitable (supra)*,

or, if an error of law were involved in supposing that the policies could be amended, no relief therefrom could have been had by the insured.

*In re Gordon (supra);*

*Baird v. Publishers', etc. (supra);*

*Dampskibs Aktieskabet Thor v. Tropical Fruit Co. (supra).*

The Circuit Court, however, while ostensibly accepting the district Court's findings, added:

"Although the Trial Court's findings of fact do not expressly state *that the reservation of the privilege to change beneficiary was omitted by mistake from the policies as originally issued*, his opinion on reargument shows that 'the erroneous form of the application *may* have been the fault of the writing agent'." (Italics ours.) (p. 155.)

This "finding" by the Circuit Court was most material to its decision, for the gist of its opinion was that the parties had intended to obtain policies reserving the right to change beneficiary. *There is neither evidence nor finding of fact by the Trial Court to support any such view.* As a matter of fact, although each policy provided (Paragraph 28):

"Unless it is stated on the first page hereof that the policy is *without* privilege of change of beneficiary, the insured, without the consent of any beneficiary, may exercise every right and receive every benefit reserved to the insured or the owner of the policy \* \* \*."

there was *typed in* on its face:

“THIS POLICY IS WITHOUT PRIVILEGE OF CHANGE OF BENEFICIARY.”

There was, therefore, no error of omission; the policies were written, in this respect, precisely as ordered—and what the Circuit Court’s “finding” amounts to is that the insured’s application for the policies ought to be reformed because, in order to make the riders effective under a plan of attaching them *after* issuance of the policies, the right to change beneficiary *ought* to have been reserved, and that the “failure” to reserve it, *may* have been the fault of the writing agent. Since the evidence discloses only that it was the insured’s intent *not* to have the right to change beneficiary, it is obvious that this “finding” is pure conjecture, and a rationalization of the conclusion that the riders *are* to be recognized.

The cases cited by the Circuit Court in support of its decision (*Williams v. North German Ins. Co.*, 24 Fed. 624; *Ulman v. Equitable Life Insurance Soc.*, 161 App. Div. 708; *Goldsmith v. Union Mutual Life Insurance Co.*, 18 Abb. N. C. 325 (N. Y.); *Snell v. Insurance*, 98 U. S. 85; *National Reserve Ins. Co. v. Scudder*, 71 Fed. (2nd) 884; *German Life Ins. Co. v. Gueck*, 130 Ill. 345; *Bosse v. Bosse*, 248 Ky. 11, *Woodfin v. Neal*, 16 Tenn. Appeals 481; *Globe Insurance Co. v. Boyle*, 21 Ohio State 119, etc.) are altogether inapplicable. They were actions for reformation of contract brought by the insured, to which those interested were parties. Reformation of the policies involved in this litigation is not and cannot be at issue since the parties are not before the court; and the Circuit Court recognized the weakness of its position in this respect by stating:

“But if we are wrong as to this and effective reformation could only be had by a court proceeding, the appellant’s position would not be bet-

ter, for at any time before his death the insured by bringing such a suit *could have obtained a decree that the actual contract of insurance made by the parties required the proceeds to be paid in accordance with the terms set forth in the rider*. In a suit upon the contract of insurance, where such procedural right to reform the policy exists, the courts often give the same relief as though a decree of reformation had actually been obtained. *Aetna Insurance Co. v. Brannon*, 99 Tex. 391, 89 S. W. 1057. See also *Stevens Institute of Technology v. Sheridan*, 30 N. J. Eq. 23. We see no reason why this principle should not be applied in litigation involving the taxability of the insurance." (Italics ours.) (pp. 157-158.)

How can it be decided in this case that the insured could have obtained a decree in reformation? Had the infants been made parties to any suit for reformation, guardians in their behalf might have produced evidence, not in this record, which would have entirely destroyed or defeated the contention that the insured had the right to reformation. Furthermore, on the evidence and findings of fact in this record it is *prima facie* clear that the insured was *not* entitled to reformation.

To say that the insured "*could have obtained a decree that the actual contract of insurance made by the parties required the proceeds to be paid in accordance with the terms set forth in the rider*" is to beg the question. Certainly if the findings of a court trying that issue were "that the insured had accepted the policies as originally written," under a misapprehension shared by him and the writing agent that he was "the owner" of the policies and could amend them, the insured would not be entitled to any such decree.

In the first paragraph of Point II, *infra*, further reason is given why the Circuit Court's recognition of a pseudo-reformation of these policies was erroneous.

## POINT II.

**Even if the riders are to be regarded as parts of the policies, the proceeds are not taxable because the deceased had no incidents of ownership therein.**

In view of the absence of a full presentation of an issue as to alleged "mistake" in the policies, and, for that matter, the lack of jurisdiction, by reason of the absence of necessary and proper parties and pleadings as to that issue, the Circuit Court's upholding of the validity of the riders cannot be regarded as encompassing the idea that the policies stand reformed to the extent that they *were* (as reformed) originally issued with reservation of the right to change beneficiary. All that can be said with even a semblance of judicial propriety is that attachment of the riders stands ratified; *i. e.*, that there are before the Court policies (giving no right to change beneficiary) of which the riders in question *are* parts. To hold otherwise is not only outside of the issues presented, but would do violence to the evidence, for the insured's four-time expression of intent to have the policies issued without benefit of reservation to him (see p. 11, *ante*) stands uncontested, and, since it is apparent that the policies *could* have been issued originally with the riders, or at least the substance thereof attached or incorporated, thereby fully carrying out the insured's expressed purposes, it will not do to say, upon the evidence, that the insured did at any time have the right to change beneficiary. Semble, a special guardian for the infant beneficiaries might very well, on the issue of "mistake" have been able to prove that the "mistake", if any, lay in

misinterpretation of the legal meaning and effect of "owner" of the policies as therein used; in which event, the right to reformation envisaged by the Circuit Court could not have existed.

In fine, and in substance, there is presented, in this case, if the riders are to be regarded as parts of the policies, the question as to whether policies giving no rights or incidents of ownership to the insured, save only the right of *becoming* owner upon the beneficiaries' prior death, are directly or by analogy within the purview of this Court's decision in *Helvering v. Hallock*, 309 U. S. 106. While the Circuit Court did not cite that case, it did rely on its own decisions in *Chase National Bank v. U. S.*, 116 Fed. (2nd) 625 and *Goldstone v. U. S.*, 144 Fed. (2) 373, and upon *Commissioner v. Washer*, 127 Fed. (2d) 446, *Bailey v. U. S.*, 31 Fed. Supp. 778 and *Liebman v. Hassett*, .... Fed. (2d) ....., all citing and relying on *Helvering v. Hallock*.

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*Bingham v. U. S.*, 296 U. S. 211 and *Industrial Trust Co. v. U. S.*, 296 U. S. 220 have heretofore been the settled law, upon the strength of which, undoubtedly, much insurance has been written in the belief that the mere taking of a precautionary measure by the insured against the contingency of the prior death of his beneficiary, to enable him to *then, and only then* make a redesignation, would not subject to tax and depletion of the benefits intended for his beneficiary, insurance not otherwise taxable. In view of lower court rulings, hereinafter referred to, there is need, it is submitted, to reaffirm the decisions above cited, by reversing the judgment in this case—if this Court, too, should hold the riders effective.

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The idea that this case may be *directly* controlled by the principle of *Helvering v. Hallock* may be immediately dismissed. A parallel to *Helvering v. Hallock* might have

existed if the insured, having control over the policies in his lifetime, had transferred that control contingently upon his death. As a matter of fact such was the situation presented to the court in the *Bailey* case where the insured had the right to change beneficiary, was "life owner" of the policies, and subsequently assigned the policies reserving unto himself, however, a right of reverter upon the beneficiary's prior death. By analogy, in *Chase National Bank v. U. S.* (116 Fed. [2d] 625) where the insured became entitled to payment of the endowment under his policy, but instead of accepting it, converted the policy into a paid up policy, and in doing so transferred the funds payable and relinquished his control, contingently however upon his death, a situation was presented which might very well have been governed in principle by *Helvering v. Hallock*. These cases are properly governed by Section 302(c) of the Revenue Act, and the fact-situations in them are obviously proper subjects for the application of an estate tax since in all of them the privilege of transferring his property has been exercised by the deceased with completion of such transfer abiding his death. If, however, the nature of the tax be borne in mind, namely, that an excise is levied upon the privilege of passing-on one's estate, it is difficult, if not impossible to conceive how the tax could properly apply to property in which the decedent never had any interest, and which accordingly he could not pass on; property which was never a part of his estate and could therefore never be transferred from his estate, either in whole or as to any element of title.

That the decedent must at some time have had a property right in insurance is not only instinct in the nature of the tax, but has been judicially affirmed by this Court and other courts many times.

*Chase National Bank v. U. S.*, 278 U. S. 237;  
*Llewelyn v. Frick*, (*supra*);

*Wyeth v. Crooks*, 33 Fed. (2) 1018;  
*Helvering v. Tetzlaff*, 141 F. (2) 8.

If it be conceded that "property" in an insurance policy consists of the ability to control, in whole or in part the proceeds thereof, then the absence of such control would demonstrate the lack of "property" in the ordinary sense; and unless the taking out of the policy by the insured or his payment of, or agreement to pay premiums, or the provision that if he should outlive his beneficiary he would obtain control of the policy, constituted a special "property" in a sense peculiar to the Estate Tax the tax would not apply. The mere taking out of the policy and the payment of premiums thereon cannot be considered as themselves giving rise to taxation because they do not in their nature represent the exercise of any privilege of passing "property" on, and the question is begged if the "property" is the policy or its proceeds. Furthermore, the taking out of a policy and payment of premiums thereon by deceased is presupposed in the vast majority of cases under the statute, which involves insurance "taken out by the decedent upon his own life, payable to beneficiaries other than his estate", and yet the mere taking out of such insurance, payment of premiums thereon, and the accrual of the death benefit thereunder has not been regarded as self-sufficient to give rise to the tax. *Chase National Bank v. U. S.*, 278 U. S. 237.

As to the reservation that upon prior death of the beneficiaries the insured or his estate shall become entitled to the proceeds, a realistic understanding and application of the tax must lead to the conclusion that no taxable incident is presented unless such reservation represents the consummation of a transfer of ownership or control previously vested in the insured; for if, as in this case, by failure of the condition of "reverter" no under-

lying transfer of property has been completed, the insured's death does not terminate any property interest on his part which could reasonably be regarded as part of his "net estate", but demonstrates that he and his estate, never having had such property interest, can never acquire one.

*Lloyd's Estate v. Commissioner*, 141 Fed. (2d) 758.

In *Helvering v. Hallock*, *Chase National Bank v. U. S.* and *Bailey v. U. S.*, the death of the settlor, grantor or insured, as the case may be, did conclude dispositions of his property by transfer previously made, and vested in beneficiaries interests not theretofore possessed in their entirety; whereas in this case, the insured's death added nothing, by way of title, which did not already exist, *ab initio*, in the beneficiaries.

It might be observed also that a life insurance policy payable to beneficiaries other than the insured's estate does not on maturity form any part of the decedent's estate, but represents a third-party-contractual payment by a stranger to the estate, outside of and without regard to the administration thereof. If it is to be taxable as part of the "net estate" of the decedent upon the transfer of which the tax is laid, it must obviously be brought into his estate by some connecting act or interest on his part, and the only relevant provision made by the Revenue Act for bringing into an estate property not ordinarily a part of it, is that contained in Section 302(c) dealing with transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death, and which by particularly specifying an "interest" in property (Section 302, 1st paragraph) of which the decedent has made a transfer precludes anything but a *transfer*, regardless of what may have been said in other cases and in other situations, where the court has

held that a "transfer" is not necessarily an element of the tax.

In this connection, it should be remarked that in *Helvering v. Hallock* a reversion resided in the decedent for practical and real purposes, although the intervention of a trustee might technically have made such reversion a "possibility of reverter" in law, and the decedent's death actually vested in the beneficiaries larger estates than the previously given life estates, *i. e.*, transmuted this reversion. There is no propriety, however, in identifying the "reversion" in *Helvering v. Hallock*, and the so-called "possibility of reverter" in this case, for while such language as "the beneficiary's title was ripened by the death", or "until the insured's death, the beneficiary was never certain of his title" might at first blush appear to be applicable, its irrelevancy is perceptible if it be considered that the tax is laid upon the privilege of *decedent's* transferring his net estate, and that unless an interest on his part, in life or at death, in the property sought to be taxed is discernible, no tax may constitutionally be levied, regardless of what effect his death may have had on the property of another.

It is submitted that the following statement of the law by the Circuit Court, Eighth Circuit, in *Walker v. United States*, 83 Fed. (2nd) 103 is correct and applicable to this case. The Court said (at p. 107):

"(5) Obviously, the provision here involved of this act is ambiguous. When the words 'taken out by the decedent upon his own life' are attempted to be applied in practical administration to the subject-matter of life insurance, varying situations are found which at once present difficulties as to what the congressional intention was. It must be kept in mind that this is an *estate tax* upon the proceeds of life insurance. *An estate tax is an excise tax upon the privilege of transferring or*

*transmitting property by reason of death and is not a tax on the property itself. It follows that unless there is such a transfer FROM THE DECEDENT—UNLESS THERE WAS SOMETHING WHICH PASSED FROM THE DECEDENT UPON DEATH—there has been no transfer; no privilege of transfer has been exercised; and there is nothing which can be subjected to an excise tax on such privilege. Therefore, where life insurance proceeds are involved, the initial inquiry is as to what, if anything, has passed from the decedent because of his death.”* (Italics in part ours; in part by the Court).

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and at p. 110:

“These policies were issued some years before the Revenue Act of 1926. They were applied for and the entire premiums paid by the decedent. In each of the policies appellant was the sole beneficiary with a provision that, should she not survive insured, the proceeds were payable to his estate. There was no reserved right in the insured to change the beneficiary.”

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also at p. 110, referring to “possibility of reverter” provisions:

“For several reasons, appellee contends the above provisions of these policies left incidents of ownership in decedent which prevented them fully vesting in appellant, and that, because thereof, the proceeds formed part of the taxable gross estate. The first of these reasons is that the beneficial interest in the policies passed to appellant only if she survived decedent—otherwise passing to the estate. The argument is that ‘the death of the decedent \* \* \* was the indispensable event giving rise to, or at least enlarging, valuable property

rights in the appellant not theretofore possessed or enjoyed.' In support, appellee cites cases dealing with property transfers *inter vivos* dependent upon and vesting only at death of the transferer. *Bingham v. United States*, 296 U. S. 211, 56 S. Ct. 180, 80 L. Ed.—, definitely determines this argument against appellee—see *Industrial Trust Co., et al. v. United States*, 296 U. S. 220, 56 S. Ct. 182, 80 L. Ed.—, and also see *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed.—(a trust transfer *inter vivos*)."

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and at p. 111:

"Congress expressly recognized and treated proceeds from insurance on the life of a decedent as a separate matter from the situation dealt with in section 302(d). Therefore, section 302(g) is not controlled or affected by section 302(d), and a construction of the latter is not controlling in determining the meaning and application of the former Section 302(g). Second, section 302(d) deals only with 'transfers' of property *from the decedent*. *Here there was no transfer from decedent within the meaning of that section or at all. The property rights here find birth in the policy; are as between the beneficiary and the insurer; and the rights of the beneficiary came into being with the life of the policy.* The result is that the proceeds of these two policies are not taxable under the Revenue Act of 1926 as part of the gross estate of this decedent." (Italics ours.)

Respectfully submitted,

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